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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-5881

ROBERT EDWARD MARSHALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 18-26, 28) is reported at 470 F.2d 34.

JURISDICTION

The judgment of the court of appeals (A. 27) was entered on November 15, 1972. The petition for a writ of certiorari was filed on December 13, 1972 and was granted on February 26, 1973. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether that portion of the Narcotic Addict Rehabilitation Act of 1966 that excludes narcotic

addicts with two or more prior felony convictions from eligibility for commitment for treatment of their addiction in lieu of criminal sentencing violates the Due Process Clause of the Fifth Amendment.

STATUTES INVOLVED

Title II of the Narcotic Addict Rehabilitation Act of 1966, 18 U.S.C. 4251–4255, is set forth in Petitioner's Brief at pp. 2–6.

STATEMENT

On February 4, 1971, petitioner pleaded guilty to a charge of entering a bank with intent to commit larceny in violation of 18 U.S.C. 2113(a); he was sentenced to ten years' imprisonment. At sentencing, he requested that he be considered for treatment as a narcotic addict pursuant to Title II of the Narcotic Addict Rehabilitation Act of 1966 ("NARA"). The court, noting his record of prior convictions for burglary, forgery and possession of a firearm, held that the two prior felony exclusion set forth in 18 U.S.C. 4251(f)(4) precluded him from consideration for such commitment. It did, however, recommend that while incarcerated he receive treatment for his narcotic addiction.[1]

[1] The rehabilitative treatment afforded addicts by the Federal Bureau of Prisons is essentially the same, whether they are committed to the Bureau's custody under NARA or under ordinary criminal sentences. However, treatment begins immediately upon commitment under NARA, and the offender is eligible for conditional release on parole after six months of treatment (18 U.S.C. 4254). Addicts not committed under NARA are not placed in the rehabilitation program until about 12 to 18 months before their anticipated release, since it is important that after-

On October 15, 1971, petitioner moved under 28 U.S.C. 2255 to vacate his sentence as illegal on the grounds that the two prior felony exclusion violates the concept of equal protection of the laws embodied in the Due Process Clause of the Fifth Amendment, and that the court's refusal on the basis of that exclusion to consider him for NARA commitment was consequently improper (A. 2–5). The district court denied the motion (A. 12–13) and the court of appeals affirmed, finding no constitutional infirmity in the legislative classifications (A. 18–26).

INTRODUCTION AND SUMMARY OF ARGUMENT

In enacting the Narcotic Addict Rehabilitation Act of 1966 (P.L. 89–793, 80 Stat. 1438), Congress initiated a program to break the narcotic addiction-criminal conduct cycle through a three-pronged experimental effort. Title I of the statute (28 U.S.C. 2901–2906) provides for rehabilitative civil commitment in lieu of trial for certain consenting narcotic addicts charged with federal offenses. Title II (18 U.S.C. 4251–4255)—involved in this case—provides for committing certain narcotic addicts who have been convicted of federal offenses for treatment in lieu of any other sentence that may be au-

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care in the community follow immediately on the institutional phase of the program. Moreover, although it is estimated that approximately 5,000 federal prisoners suffer from some degree of drug dependency, the optimum capacity of the facilities operated under NARA is presently about 600. A roughly equivalent number of addicts can be treated in non-NARA facilities. Thus, although commitment under NARA assures treatment, a judicial recommendation for similar treatment at the time an ordinary criminal sentence is imposed does not.

thorized by law. Title III (42 U.S.C. 3411-3426) provides for rehabilitative civil commitment at the instance of the addict himself or a "related individual" for certain narcotic addicts who are not charged with any federal offense.

Commitment is limited to those addicts who are adjudged likely to be rehabilitated through treatment. Under Title II, if the court believes a convicted offender is an addict who is *otherwise eligible* under the Act for treatment, the court may place the offender in the custody of the Attorney General for a study to determine whether he is in fact an addict, and whether he is likely to be rehabilitated through treatment. The Attorney General reports his conclusions to the court within thirty days, or such longer period as the court permits. 18 U.S.C. 4252. If the court then determines that the offender is an addict who is likely to be rehabilitated, it commits him to the custody of the Attorney General for an indeterminate period, not to exceed either 10 years or the maximum sentence for the offense for which he was convicted, whichever is shorter. 18 U.S.C. 4253(a).[1]

[1] Under Title I, the initial judgment as to the likelihood of rehabilitation is made by the Surgeon General, after commitment for examination to the custody of either the Surgeon General or the Attorney General. 28 U.S.C. 2902(a). Under Title III, the initial judgment is made by two qualified physicians (including at least one psychiatrist) appointed by the district court. Alternatively the court in its discretion may commit the addict to the custody of the Surgeon General for the examination. 42 U.S.C. 3413. Under both of those titles, the judge makes the final decision, unless, under Title III, the addict demands a jury trial (28 U.S.C. 2902(b); 42 U.S.C. 3414(a)).

The opportunity to be considered for rehabilitative commitment is limited under all three titles. Titles I and II contain parallel definitions of eligibility (28 U.S.C. 2901(g); 18 U.S.C. 4251(f)) which exclude from consideration (1) those who are charged with (Title I) or convicted of (Title II) specifically defined crimes of violence; (2) those who are charged with (Title I) or convicted of (Title II) unlawfully selling a narcotic drug (unless, under Title II, the court determines that the primary purpose of the sale was to enable the person seeking rehabilitative commitment to obtain for his own use a narcotic drug which he required because of his addiction); (3) those against whom there are pending prior felony charges or who are under sentences which have not been fully served;[3] (4) those who have been convicted of a felony on two or more prior occasions; and (5) those who have previously been committed because of narcotic addiction under any federal or state program on three or more occasions.[4]

Petitioner contends that the fourth exclusion adopted by Congress—of persons with two or more prior felony convictions—has no rational basis, and thus that its application to preclude him from consideration for rehabilitative commitment in lieu of the penal sentence which he received constituted a violation of his Fifth Amendment due process right to the

[3] A person on probation, parole, or mandatory release may be committed if the authority empowered to order his return to custody consents to his commitment.

[4] The exclusion under Title III parallels the third exclusion in Titles I and II; it bars from consideration those against whom criminal charges are pending or who are under sentence.

equal protection of the laws. Examination of the legislative history and the scheme of the legislation itself shows that the basis for the exclusion of addicts with two prior felony convictions was the desire to assure that the benefits of the limited experimental program being established would be available to those most likely to be benefited by it—those who were primarily addicts, and only secondarily criminals. At the same time, Congress did not wish the program to be used as a means for hardened criminals to escape punishment. The two prior felony exclusion was thus adopted as one of several easily applied criteria for husbanding the limited resources allocated to the program. Since the classification, which is not inherently suspect, bears a rational relation to a legitimate legislative purpose, there is no denial of equal protection. The courts of appeals which have found such a denial have incorrectly substituted their judgment concerning the wisdom of the exclusion for that of the Congress.

ARGUMENT

THE PROVISION OF 18 U.S.C. 4251(f)(4), PRECLUDING CONSIDERATION FOR REHABILITATIVE COMMITMENT OF NARCOTICS ADDICTS WHO HAVE BEEN CONVICTED OF TWO OR MORE PRIOR FELONIES, DOES NOT OFFEND THE CONCEPT OF EQUAL PROTECTION EMBODIED IN THE FIFTH AMENDMENT DUE PROCESS CLAUSE

A. CONGRESS ENACTED THE NARCOTIC ADDICT REHABILITATION ACT COMMITMENT PROGRAM AS AN EXPERIMENTAL PILOT PROJECT FOR WHICH ONLY THOSE ADDICTS DEEMED MOST CAPABLE OF BEING REHABILITATED WOULD BE ELIGIBLE

Although relatively broad in its reach, the bill which became the Narcotic Addict Rehabilitation Act was "only a pilot project," which offered a "chance

to experiment on a very limited scale, under careful court and medical supervision." (112 Cong. Rec. 11814 [Rep. Hungate].) The Senate Committee noted that the bill "does not pretend to offer a final and total solution to the problem of treating narcotic addiction." S. Rep. No. 1667, 89th Cong., 2d Sess., at 14. Because of the experimental nature of the program, provisions were written to limit the class of persons eligible for consideration for rehabilitative commitment in lieu of criminal sentencing. As the Surgeon General explained while testifying in favor of the version of the legislation proposed by the administration, the limitations were "adopted in the interest of public safety, and in recognition of the still novel and somewhat uncharted nature of this kind of program." Hearings before Subcommittee No. 2 of the House Committee on the Judiciary, Civil Commitment and Treatment of Narcotic Addict, 89th Cong., 1st and 2d Sess., at 121.[5]

More specifically, the limitations on eligibility reflect three interrelated congressional aims: to maximize the chances for success of the initial program, to

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[5] During debate, the proposed legislation was described as a "first step" (112 Cong. Rec. 11817 [Rep. Multer], 11835 [Rep. Halpern]), a "good start" (112 Cong. Rec. 25433 [Sen. Ervin]), a "good beginning" (112 Cong. Rec. 25433 [Sen. Robert F. Kennedy of New York]), and a "considered step in the right direction" (112 Cong. Rec. 11813 [Rep. McCullouch]). Representative Celler noted that Congress was "striking out on a new path" and was "only on the threshold of the attempt to cure drug addiction" (112 Cong. Rec. 11898), and Senator Ervin stated that "[w]e do not know enough about the problem yet to legislate with finality" (112 Cong. Rec. 25433).

[6] Cited hereafter as "Hearings."

keep its costs within bounds, and to protect society by preventing the program from becoming a means by which hardened criminals could avoid penal sanctions. The federal voluntary commitment program in operation at the time NARA was being debated had a relapse rate of 75%, and even in the more successful program operated by the state of California the relapse rate was 50% (Hearings, at 125). The relative success of the California program was attributed to its emphasis on after-care and close supervision. These were to be similarly emphasized in the new federal program (S. Rep. No. 1667, *supra*, at 15).[1] Accordingly, the three titles establishing the different forms of rehabilitative commitment provide that no addict is to be committed thereunder unless adequate facilities or personnel for his treatment are available. 28 U.S.C. 2902(b); 18 U.S.C. 4253(a); 42 U.S.C. 3422.

The questions whether available resources were adequate for a successful program and, if they were not, what the potential cost of providing new facilities would be, troubled Congress throughout its consideration of the legislation. Despite the inquiries of doubting members of the House subcommittee, the Director of the Bureau of Prisons indicated that no new facilities or personnel would be required to implement the Act (Hearings, at 388, 389–391, 393). The Surgeon General testified, however, that the federal facility

[1] A number of Congressmen pointed out during debate that an unsuccessful program operated by the State of New York owed its difficulties to its lack of sufficient facilities and trained personnel. 112 Cong. Rec. 11827 (Rep. Reid of New York), 11897 (Rep. Farbstein), 28549 (Rep. Addabbo).

then used for the voluntary commitment program was already operating at essentially full capacity (Hearings, at 119), and the Prisons Director admitted that there was no way of estimating how many addicts would be committed under NARA (Hearings, at 393).

A number of Congressmen therefore urged the necessity of expanding federal facilities and appropriating adequate funds to accomplish this expansion.[8] This approach, however, was rejected. An amendment which would have added a fifteen million dollar appropriation to the bill for such an expansion was defeated, at least in part because of a reluctance to expend such a sum on an experimental program. See generally 112 Cong. Rec. 11896–11901.[9]

Congress therefore adopted the alternative approach: In order to limit expenditures and still provide extensive enough treatment to give the program a chance of success, it restricted the classes of persons who would be eligible to participate in the program. Instead of authorizing an attempt to treat all narcotics addicts who engage in criminal conduct, it established a "pilot project," which was intended to reach that group which was considered both most amenable

[8] 112 Cong. Rec. 11817 (Rep. Gallagher), 11826 (Rep. Wright), 11835–11836 (Rep. Halpern), 11894 (Rep. Bingham), 11897 (Rep. Farbstein), 11898 (Rep. Tenzer), 11901 (Rep. Gilbert).

[9] In conference, the House accepted a Senate amendment adding a fifteen million dollar appropriation for each of two fiscal years, but the purpose of the appropriation was not to provide new federal facilities, but rather to enable the Surgeon General to make grants to states, municipalities and private institutions for non-federal programs. See H. Rep. No. 2316, 89th Cong., 2d Sess., at 19–20; P.L. 89–793, Title IV, § 402, 80 Stat. 1448.

to treatment, and most deserving of the special benefits provided by the new law."[10]

The intended effect of the legislation was thus "to confine eligibility for the benefits of the legislation to addicts accused of nonviolent crimes who show good prospects for rehabilitation, while retaining strict criminal punishment for dangerous or hardened offenders, narcotics pushers, and persons with a history of failure to respond to treatment." S. Rep. No. 1667, *supra*, at 17, see also *id.* at 13.[11]

The two prior felony exclusion provided an easily administered means of implementing this intent. In the first place, there had been testimony that half of those convicted of narcotic offenses had two or more prior felony convictions while the remainder had one or none (Hearings at 381). If the same statistics were generally true of addicts convicted of non-narcotic offenses, the exclusion would approximately

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[10] Representative McClory, a member of the subcommittee which considered the bill, explained:

"[N]arcotic addiction frequently is found among the criminal element. They are first of all criminals; secondarily, they are narcotic addicts.

"Under this legislation what we are aiming to get at is the narcotic addict who is secondarily guilty of some sort of minor or nonviolent offense. When the judge feels that such an offender can be rehabilitated and his addiction treated as a disease, he will be given the advantage of civil commitment procedure under title I and title II" (112 Cong. Rec. 11813).

[11] The quoted language was used to explain the eligibility limitations contained in Title I. The explanation applies equally, however, to the limitations contained in Title II, since the categories of eligibility are the same. See S. Rep. No. 1667, *supra*, at 18.

halve the number of addicts eligible for treatment, thereby effectively husbanding the limited resources available. Moreover, a focus on whether an offender has two or more prior felony convictions provides an entirely reasonable dividing line for determining when a man is primarily an addict and secondarily a criminal and when the reverse is more likely to be true. Thus the exclusion also tended to assure that the limited resources were allocated to the group Congress had determined was particularly likely to benefit from treatment, rather than to those especially deserving traditional criminal sentencing. The two prior felony exclusion, in short, was intended, like its companion exclusions, to serve the purpose of maximizing the chances for success of the experimental pilot project, while avoiding the danger that it would be used to permit hardened offenders to escape punishment.

B. THE TWO PRIOR FELONY EXCLUSION RATIONALLY SERVES THE LEGITIMATE LEGISLATIVE PURPOSE OF EFFICIENTLY ALLOCATING THE LIMITED RESOURCES WHICH CONGRESS WAS WILLING TO COMMIT TO THE NARA PROGRAM

The congressional belief that limitations on eligibility were necessary in order to apportion the limited resources available for the proposed rehabilitation program was warranted. The Bureau of Prisons presently maintains five facilities to handle addicts committed for treatment or study under Title II of the Act.[12]

[12] These facilities are located at Milan, Michigan; Danbury, Connecticut; Terminal Island, California; Alderson, West Virginia; and Forth Worth, Texas. There are also 10 similar non-NARA facilities in which about 550 addicts from the general prison system are treated.

According to the bureau, these facilities have an optimum capacity of 600,[13] but as of April 30, 1973, the facilities were being operated at over 100% capacity.[14] Any substantial relaxation in eligibility qualifications would thus overburden facilities which are already being operated above optimum capacity. The impact of relaxing eligibility requirements cannot, moreover, be minimized by arguing that such a relaxation will increase only the number of those qualifying for consideration for treatment and not necessarily those who will actually receive treatment. The same resources—in terms of space, beds and personnel—are used for those committed for study as are used for those actually being treated.[15]

The real question presented by this case is thus whether Congress could properly conclude that addicts, upon their third conviction for a felony, constitute such doubtful and undeserving prospects for

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[13] Optimum capacity is determined to some extent by the number of psychologists, case workers, and correction counselors available at each facility. According to the Bureau of Prisons, the goal is to have one psychologist, one case worker and two correction counselors for every fifty addicts, although in the general prison system a caseload for case workers and correction counselors of 200 is considered acceptable.

[14] There were 647 addicts in the five facilities: 493 assigned for treatment and 94 for preliminary study under NARA, and 60 non-NARA addicts from the general prison system.

[15] Although offenders committed for study typically stay in the facility for only a month, as opposed to the typical stay of 14 months for treatment, the overall load imposed on the facilities by commitments for study remains fairly constant. Throughout the six months from December 1972 through May 1973, there were approximately 100 offenders undergoing study at all times.

rehabilitation that it would unduly burden the limited resources of the program to allow them to be committed even for study. This Court's prior pronouncements on the subject of equal protection demonstrate clearly that Congress could properly reach that conclusion.

1. The constitutional test to be applied becomes clear when the issue in this case is kept in mind. What the Court is called upon to review is a statute that creates new mechanisms for affording an alternative to criminal sentencing for certain persons convicted of federal felonies. In determining to whom to extend these benefits, Congress has carved out from eligibility a class of convicted felons who have previously committed at least two other felonies. Thus, the restriction relates to a statutory benefit, not a fundamental constitutional right, and the classification itself is not based on race, color, religion, national origin, political belief—or any inherently "suspect" classification.

Since the statutory judgment concerns essentially a matter of social and penal policy, "the applicable standard, in measuring the propriety of Congress' classification, is that of rational justification," rather than that of a "compelling governmental interest." *United States* v. *Kras,* 409 U.S. 434, 446. See, also, *San Antonio Independent School District* v. *Rodriguez,* No. 71–1332, decided March 21, 1973, slip op. at 29–30, 33–36. It is constitutionally sufficient that classifications which, like this one, are not inherently suspect "bear some rational relationship to a legitimate

state end"; they "will be set aside as violative of the equal protection clause only if based on reasons totally unrelated to the pursuit of that goal." *McDonald* v. *Board of Education*, 394 U.S. 802, 809; see also *McGowan* v. *Maryland*, 366 U.S. 420, 425.

These principles of judicial deference to legislative policy judgments naturally apply with equal force to review of penological determinations on how to deal with those convicted of crimes, which "require only some rational basis to sustain them." *McGinnis, Commissioner of Correction* v. *Royster*, No. 71-718, decided February 21, 1973, slip op. p. 7. A statutory "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489. Nothing in the Constitution requires a legislature to "choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge* v. *Williams*, 397 U.S. 471, 487. "Legislation need not deal with all phases of a problem in the same way, so long as the distinctions drawn have some basis in practical experience." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 331. And when a legislature elects to move in an area of social policy, "[s]o long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems * * * are not subject to a constitutional straitjacket." *Jefferson* v. *Hackney*, 406 U.S. 535, 546.

2. Under these settled principles, the eligibility limitation for NARA commitment challenged by petitioner measures up to the requirements of rationality

and fair legislative judgment. It is evident, as we have shown, that Congress decided to enact, as a "pilot project," a rehabilitative program of reasonable cost which would have fair prospects for success. The limitations on eligibility were adopted, at least in part, in order to allocate efficiently the limited resources which Congress was at that time willing to commit to the program. Petitioner's complaint is simply that what Congress proclaimed to be its "first step" was not long enough to reach him, but that complaint makes out no denial of equal protection.

In his attempt to demonstrate that the two prior felony exclusion lacks a "basis in practical experience," petitioner relies primarily upon decisions of the First Circuit in *United States* v. *Bishop*, 469 F. 2d 1337, and of the District of Columbia Circuit in *Watson* v. *United States*, 439 F. 2d 442, *United States* v. *Williams*, 442 F. 2d 738, *Chicquelo* v. *United States*, 452 F. 2d 1310, and *United States* v. *Hamilton*, 462 F. 2d 1190.[16] An examination of the grounds for decision in both circuits, however, discloses that there is no merit to their holdings of lack of rational connection between the exclusion and the purpose for which it was adopted.

a. Underlying the holdings in both circuits is an unwillingness to accept the fact that the two prior felony exclusion, like its companion limitations on eligibility, was adopted for the purpose of allocating limited re-

[16] *Watson*, *Williams* and *Chicquelo* involved prior *narcotics* offenses. *Hamilton* and *Bishop* involved, as does this case, convictions for non-narcotic offenses.

sources to those deemed by Congress most likely to benefit from their use. The District of Columbia Circuit simply rejected this purpose, holding that "[s]o long as Congress has provided a procedure whereby the likelihood of rehabilitation is determined by the trial judge, who may seek the assistance of the Attorney General in that regard, there is no rational justification for a conclusive presumption that an addict with two or more prior felony convictions is not rehabilitable." *United States* v. *Hamilton*, *supra*, 462 F. 2d at 1192. The First Circuit found that reliance upon allocation of resources as a purpose is "vitiated" by the fact that repeat felons can receive treatment after a regular criminal sentence (*United States* v. *Bishop*, *supra*, 469 F. 2d at 1343, n. 11),[11] and held that the exclusion "is aimed *primarily* at avoiding 'light' sentencing for or the introduction into NARA centers of dangerous criminals, not to weed out those unlikely to be rehabilitated." 469 F. 2d at 1346 (emphasis added). It also took note of the trial court's duty to determine likelihood of rehabilitation in individual cases, and assumed that it is only "judicial resources" which are conserved by the exclusion. 469 F. 2d at 1344.

The District of Columbia Circuit incorrectly characterized the exclusion as a "conclusive presumption

[11] As indicated in our supplemental memorandum in this case withdrawing our opposition to the grant of certiorari, priority for treatment goes to those offenders who are committed under Title II. Non-NARA offenders can obtain treatment for their addiction only to the extent that facilities to care for them are available beyond those required for NARA commitments.

that an addict with two or more prior felony convictions is not rehabilitable." *United States* v. *Hamilton*, *supra*, 462 F. 2d at 1192. Congress did not so conclude; instead, it compared the prospects for rehabilitation of such addicts with the prospects of those with fewer than two prior convictions, and concluded that the prospects of the latter group were sufficiently better than those of the former to justify devoting the limited resources being made available to attempts to cure addicts without substantial criminal records. Nor, as the First Circuit appeared to suggest, were the resources that Congress sought to apply most productively primarily those of the judiciary. Part of the judicial process of determining likelihood of rehabilitation under Title II involves committing the convicted addict for study. But, as noted above (p. 12), resources devoted to addicts committed for study could otherwise be used by addicts committed for treatment.

The First Circuit was equally incorrect when it held that the "primary" purpose of the exclusion is punitive, rather than allocative of resources. Concededly, the limitations on eligibility were intended in part to protect society by assuring that NARA would not permit multiple offenders to escape punishment. But, as we have shown, the punitive and allocative functions were presented as two sides of the same coin—the multiple offender was thought to be both deserving of punishment and a bad prospect for rehabilitation, while the addict without a substantial record was thought to be both particularly deserving of treatment and a good prospect for rehabilitation. In any event, this Court

has recently warned against "pick[ing] and choos[ing] among legitimate legislative aims to determine which is primary and which subordinate." *McGinnis, Commissioner of Correction* v. *Royster*, *supra*, slip op. at 13. The Court there further explained (*id.* at 14):

> Legislation is frequently multipurposed; the removal of even a "subordinate" purpose may shift altogether the consensus of legislative judgment supporting the statute. Permitting nullification of statutory classifications based rationally on a nonprimary legislative purpose would allow courts to peruse legislative proceedings for subtle emphases supporting subjective impressions and preferences. The Equal Protection Clause does not countenance such speculative probing into the purpose of a coordinate branch.

It is thus not appropriate, in determining whether there is a rational justification for the two prior felony exclusion, to divorce that exclusion from the allocative function which Congress intended for it.

b. Having improperly dismissed the exclusion's allocative function, the courts in *Bishop*, *Watson*, and *Hamilton*, found "anomalies, in the root sense of inequalities" (*United States* v. *Bishop*, *supra*, 469 F. 2d at 1343) in the exclusion.

The "anomalies" identified reflect, in large part, simply the courts' disagreement with the legislature's judgment. In *Bishop*, the disagreement related to the relative weight to be given to past convictions in comparison to current ones, or to be given to a number of

convictions as indicating an established pattern of behavior. In *Hamilton*, it related to the possible deterrent effect of the exclusion: "it may be irrational to assume that an addict's sensitivity to deterrent influences can be measured by anything other than the strength of his addiction." *United States* v. *Hamilton*, *supra*, 462 F. 2d at 1194, n. 7.

To the extent that the court in *Bishop* found an inconsistency between Title III and the other two titles, it overlooked the differences between that title and the rest of the Act. Although it is true that addicts with more than two offenses may be considered for civil commitment under Title III but not under Titles I and II, the provisions of Title III are not applicable to those charged with current offenses, and thus there is no danger that civil commitment is being misused to evade possibly appropriate penal sanctions. Moreover, since the study preceding commitment under Title III is ordinarily made by court-appointed private physicians, the pre-commitment burden on the resources of the government's rehabilitation program is avoided. For these reasons, Congress could rationally conclude that it was not necessary to limit those eligible for Title III commitment as stringently as was appropriate under Titles I and II.

In any event, the two prior felony exclusion and its companion limitations on eligibility bear a rational relationship to the legitimate aim of allocating the limited resources which Congress was willing to commit to the new and experimental social welfare pro-

gram that it was instituting. It is not fatal that some addicts with more than two felony convictions might be more "deserving" of a non-criminal sentence than some addicts who are eligible for such commitment as the Act was drawn, or that some people in the former class might actually be better prospects for rehabilitation than some individuals in the latter class. The essence of the legislative function is the exercise of a policy judgment about general categories. Minor inconsistencies in the eligibility limitations are therefore immaterial. A "law need not be in every respect logically consistent with its aims to be constitutional." *Williamson* v. *Lee Optical Co., supra,* 348 U.S. at 487–488. "In the area of * * * social welfare, a [legislature] does not violate the equal protection clause merely because the classifications made by its laws are imperfect." *Dandridge* v. *Williams, supra,* 397 U.S. at 485.

Congress had to draw the line somewhere to keep its pilot project within manageable bounds, and Congress could rationally determine that in general the rehabilitation prospects are *likely* to be better for those whose prior criminal conduct has been minimal, and that a person with a shorter criminal record is probably more deserving of non-penal treatment than a habitual offender. The standard to be applied in judging the validity of the classification system that Congress chose is therefore the one enunciated this Term in *McGinnis, Commissioner of Correction* v. *Roy-*

ster, supra, slip op. at 7—a case that also involved classifications for purposes of post-conviction rehabilitation:

> [T]his Court has observed that "the problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." *Metropolis Theatre Co.* v. *City of Chicago,* 228 U.S. 61, 69–70 (1913). We do not wish to inhibit [legislative] experimental classifications in a practical and troublesome area, but inquire only whether the challenged distinction rationally furthers some legitimate, articulated [legislative] purpose.

The classification here adopted by Congress meets this standard.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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